STATE OF ALASKA

IBLA 87-254 Decided April 13, 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, finding state selection filings under section 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. | 1635(e) (1982), to have no present segregative effect. F-85354, et al.

Affirmed.

1. Alaska National Interest Lands Conservation Act: State Selections

A selection by the State of Alaska under sec. 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. | 1635(e) (1982), is, by definition, for lands that are not presently available for selection. Under the statute, the selection takes effect if and when the lands become available for selection. Until the selec- tion takes effect, the selection has no present segrega-tive effect.

APPEARANCES: M. Francis Neville, Esq., Assistant Attorney General, Anchor- age, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Manage- ment.

OPINION BY ADMINISTRATIVE JUDGE LYNN

The State of Alaska has appealed from a December 19, 1986, decision of the Alaska State Office, Bureau of Land Management (BLM), finding that 60 State land selection applications have no present segregative effect.

On June 24, 1986, the State of Alaska filed 60 general purpose and public domain community grant applications pursuant to sections 6(a) and 6(b) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339 (State- hood Act), 1/ and section 906(e) of the Alaska National Interest Lands

1/ Section 6(a) states in part:

"For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled

Conservation Act (ANILCA), 43 U.S.C. | 1635(e) (1982). 2/ (See appendix.) The selected lands are located within the trans-Alaska pipeline utility corridor.

In its December 19, 1986, decision, BLM found that the requested lands had been withdrawn from all forms of appropriation, including selection by the State of Alaska, for use as a utility and transportation corridor

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fn. 1 (continued)
to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropri- ated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of Interior as to other public lands: * * *."

Section 6(b) states in part:

"The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: * * *".

2/ Section 906(e) provides:

"(e) Future 'top filings'

"Subject to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act, the State, at its option, may file future selection applications and amendments thereto, pursuant to section 6(a) or (b) of the Alaska Statehood Act or subsection (b) of this section, for lands which are not, on the date of filing of such applications, avail- able within the meaning of section 6(a) or (b) of the Alaska Statehood Act, other than lands within any conservation system unit or the National Petroleum Reserve--Alaska. Each such selection application, if otherwise valid, shall become an effective selection without further action by the State upon the date the lands included in such application become avail- able within the meaning of subsection (a) or (b) of section 6 regardless of whether such date occurs before or after expiration of the State's land selection rights. Selection applications heretofore filed by the State may be refiled so as to become subject to the provisions of this subsection; except that no such refiling shall prejudice any claim of validity which may be asserted regarding the original filing of such application. Nothing contained in this subsection shall be construed to prevent the United States from transferring a Federal reservation or appropriation from one Federal agency to another Federal agency for the use and benefit of the Federal Government."

by Public Land Order No. (PLO) 5150. 36 FR 25410-13 (Dec. 28, 1971). 3/
Accordingly, BLM concluded that the State filings did not attach as selec- tions and had no segregative effect as to the lands withdrawn by PLO 5150. BLM concluded, however:

> The State filings pursuant to ANILCA Sec. 906(e) are recognized as future interest applications, but do not become effective
> until such time as the appropriate PLO is modified to allow State selection. At that time, the State filings would become State selections with the segregative effect and 906(k)(1) concurrence requirement. Prior to an opening order, the 906(e) filings have no segregative effect.

(Dec. 19, 1986, decision at 2).

Alaska appeals only from BLM's finding that the section 906(e) filings have no present segregative effect. The State argues that, like any other State selection application, a 906(e) selection "immediately segregates the land from any type of application, selection, location, entry, or settle-
ment by a third party which would prevent the State selection from becoming effective" (Statement of Reasons at 2).

Alaska first contends that BLM's interpretation of section 906(e) fails to give effect to all the provisions of the section, specifically the last sentence which states: "Nothing contained in this subsection shall be con- strued to prevent the United States from transferring a Federal reservation or appropriation from one Federal agency to another Federal agency for the use and benefit of the Federal Government." Alaska argues that this sen- tence would have been totally unnecessary if Congress had agreed with BLM that BLM was free to dispose of the land at issue to anyone, including non-Federal third parties.

BLM asserts that its interpretation of section 906(e) as not having a present segregative effect is not inconsistent with the last sentence of
the section. BLM notes that when section 906(e) is read with section 6(g) of the Statehood Act, 72 Stat. 341, the State's selection automatically
falls into place as soon as the land becomes available. This preference right could be viewed, according to BLM, as precluding the issuance of a
new PLO and thereby foreclosing the Federal Government's ability to manage the land.

We agree with BLM that its interpretation of section 906(e) does not render the last sentence superfluous.

3/ PLO 5150 provides in relevant part:

"Subject to valid existing rights, the * * * lands are hereby with-
drawn from all forms of appropriation under the public land laws except for location for metalliferous minerals under the mining laws * * *, and is also withdrawn from leasing under the mineral leasing laws and from selection by the State of Alaska under the Alaska Statehood Act * * *."

Alaska next argues that under the "notation rule" or "tract book rule," its filing of a section 906(e) selection and BLM's notation of that filing on the appropriate Master Title Plat, segregates the land from other forms of appropriation, just as does the filing of any other State selection.
In support of this argument, Alaska cites State of Alaska, 73 I.D. 1 (1966), aff'd, Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968); Shiny Rock Mining Corp. v. United States, 629 F. Supp. 887 (D. Or. 1986); B.J. Toohey, 88 IBLA 66, 81 (1985); and State of Alaska, 6 IBLA 58, 79 I.D. 391 (1972).

The notation or tract book rule was described by the Board in Margaret L. Klatt, 23 IBLA 59, 63-64 (1975):

> The notation rule, which insofar as the public is concerned, strives to give to all the public an equal opportunity to file * * *, presupposes that the item noted on the records, i.e., a homestead entry, oil or gas lease, patent, segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a later would-be applicant who does not go behind it. That is, a notation of a patent on the records segregates the land it describes from a later applica- tion, even though the patent is invalid. A later applicant, knowing of the invalidity, can gain no right to the land until
> the patent is canceled and the cancellation noted on the proper records. Anyone else interested in the land, whether he knows
> of the defect or not, can also rely on the fact that no other person can establish a prior right so long as the entry remains of record. The record itself constitutes a bar to any other filing whatever the situation may be on the land itself. Thus, everyone may rely on the record to give him an equal opportunity to file when the land again becomes available.

(Quoted in Toohey, supra, 88 IBLA at 78, 92 I.D. at 324). The notation
or tract book rule has been consistently followed by the Department, both when the item noted on the records is valid as well as when it is void or voidable. See Toohey, supra. 4/

Alaska argues that BLM can only reach the conclusion that a section 906(e) selection does not have the same segregative effect as any other State selection by assuming that Congress was totally ignorant of the notation or tract book rule when it enacted ANILCA. It further contends

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4/ Regulations effective May 15, 1987, subsequent to BLM's decision in this case, were intended, in part, "to limit the use of the notation rule as the official procedure for disclosing the availability of the public lands for public use. The new procedures will, to the extent possible, eliminate the notation rule and provide greater public notice, through publication of opening and closing orders, of the status of the public lands. Publication of opening and closing orders should provide greater accessibility to information about
the public lands for the public."
52 FR 12171 (Apr. 15, 1987).

that the fact that Congress did not explicitly provide that section 906(e) selections had a present segregative effect did not leave BLM free to
ignore long-established case law.

BLM's general answer to this argument is that section 906(e) is expressly directed toward future events. Thus, the section allows a present selection of lands that are not presently available for selection to remain on record and take effect if and when the selected lands become available. Except for this section, BLM notes that the State's selection of lands
not presently available would have to be rejected. BLM indicates that
this future effect also allows the State to file selections that might take effect after the date of expiration of the State's land selection rights.

The Board has carefully considered Alaska's arguments and the language of section 906(e). That section, which is remedial legislation providing
an exception from the normal filing requirements, simply does not provide any basis for a finding that it was intended to have any present effect, including a present segregative effect. The Board begins this analysis with the assumption that Congress was well aware of the notation or tract book rule when it enacted section 906(e). Any such awareness is, however, not inconsistent with a finding that the language and purpose of section 906(e) are clearly and solely directed toward the future, with no indication that Congress intended any present effect from a filing under the section.

Alaska also argues that a finding that its section 906(e) selection had a present segregative effect is required under 43 CFR 2627.4, which states:

> (b) Segregative effect of applications. Lands desired by
> the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the proper office properly describing the lands as provided in | 2627.3(c)(1)(iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

Alaska argues that although this regulation predates ANILCA, it was obvi- ously meant to apply to selections made under ANILCA because it was not changed between the date of enactment of ANILCA and BLM's decision in this case. 5/

5/ The May 15, 1987, change to 43 CFR Part 2090, 52 FR 12171 (Apr. 15, 1987), provides in amended sec. 2091.1(a) that

"applications which are accepted for filing shall be rejected and
cannot be held pending possible future availability of the lands or inter- ests in lands, except those that apply to selections made by the State of Alaska under section 906(e) of the Alaska National Interest Conservation Act * * * when approval of the application is prevented by: (1) A with- drawal, reservation, classification, or management decision applicable to the lands."
52 FR at 12176.

At the time of BLM's decision in this case, the regulations in 43 CFR 2627.4 applied, by their very terms, only to selections made under the Statehood Act and a 1929 Act authorizing Alaska to select certain public lands for the use and benefit of the University of Alaska. Act of Jan. 21, 1929, 45 Stat. 1091, as supplemented by the Statehood Act, 72 Stat. 339,
343, 43 U.S.C. | 852 Note. 6/ There simply is no regulatory provision requiring a finding that a selection under section 906(e) has a present segregative effect.

[1] The Board has previously declined to find a present segregative effect for a selection when neither a statute nor regulation provided for such an effect. See, e.g., Basil S. Bolstridge, 90 IBLA 54 (1985); David Cavanagh, 89 IBLA 285 (1985). Because we find no statutory or regulatory provision providing for a present segregative effect for a State selection under section 906(e) of ANILCA, we conclude that BLM properly determined that such a selection had no segregative effect until such time as the selection took effect if and when the lands selected became available for selection.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Kathryn A. Lynn
Administrative Judge
Alternate Member

I concur:

John H. Kelly
Administrative Judge

fn. 5 (continued)
The amendments also provide in sec. 2091.9-2, that "[t]he segregation and opening of lands authorized for selection and selected by the State of Alaska under the various statutes granting lands to the State of Alaska are covered by Subpart 2627 of this title."
52 FR at 12178.
6/ The authority provisions of 43 CFR Subpart 2627 were not expanded in the 1987 rulemaking.

APPENDIX

Serial Number	Township
	Fairbanks Meridian
F-85354	T. 33 N., R. 9 W.
F-85352	T. 34 N., R. 9 W.
F-85350	T. 35 N., R. 9 W.
F-85348	T. 36 N., R. 9 W.
F-85346	T. 37 N., R. 9 W.
*F-85441	T. 12 N., R. 10 W.
	North of the Yukon River
*F-85439	T. 13 N., R. 10 W.
F-85361	T. 30 N., R. 10 W.
F-85358	T. 31 N., R. 10 W.
F-85355	T. 32 N., R. 10 W.
F-85353	T. 33 N., R. 10 W.
F-85351	T. 34 N., R. 10 W.
F-85349	T. 35 N., R. 10 W.
F-85347	T. 36 N., R. 10 W.
F-85346	T. 37 N., R. 10 W.
*F-85442	T. 12 N., R. 11 W.
F-85440	T. 13 N., R. 11 W.
F-85365	T. 28 N., R. 11 W.
F-85363	T. 29 N., R. 11 W.
F-85337	T. 30 N., R. 11 W.
*F-85360	
F-85357	T. 31 N., R. 11 W.
F-85355	T. 32 N., R. 11 W.
F-85351	T. 34 N., R. 11 W.
F-85347	T. 36 N., R. 11 W.
F-85376	T. 25 N., R. 12 W.
F-85372	T. 26 N., R. 12 W.
F-85368	T. 27 N., R. 12 W.
F-85336	T. 28 N., R. 12 W.
F-85362	T. 29 N., R. 12 W.
*F-85339	T. 30 N., R. 12 W.
F-85359	
F-85356	T. 31 N., R. 12 W.
F-85380	T. 24 N., R. 13 W.
F-85375	T. 25 N., R. 13 W.
F-85371	T. 26 N., R. 13 W.
F-85367	T. 27 N., R. 13 W.
F-85364	T. 38 N., R. 13 W.
F-85345	T. 17 N., R. 14 W.
F-85344	T. 18 N., R. 14 W.
F-85343	T. 19 N., R. 14 W.
F-85390	T. 21 N., R. 14 W.

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F-85387 T. 22 N., R. 14 W.

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F-85383	T. 23 N., R. 14 W.
*F-85340	
F-85379	T. 24 N., R. 14 W.
F-85374	T. 25 N., R. 14 W.
F-85370	T. 26 N., R. 14 W.
F-85366	T. 27 N., R. 14 W.
F-85342	T. 19 N., R. 15 W.
F-85391	T. 20 N., R. 15 W.
F-85389	T. 21 N., R. 15 W.
F-85386	T. 22 N., R. 15 W.
F-85382	T. 23 N., R. 15 W.
*F-85341	
F-85378	T. 24 N., R. 15 W.
F-85373	T. 25 N., R. 15 W.
F-85384	T. 22 N., R. 16 W.
F-85381	T. 23 N., R. 16 W.
F-85377	T. 24 N., R. 16 W.

*Public Domain Community Grant